

No. 15873

**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

E. B. HOUGHAM, OWEN DAILEY, WILLIAM E.
SCHWARTZE AND HARLAN L. MCFARLAND, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN
DIVISION

**RESPONSE TO APPELLEES' REPLY TO PETITION FOR
REHEARING**

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In appellees' reply to the Government's petition for rehearing, they suggest that the decision of this Court may be justified on the ground that "the Court has merely found that the Government has failed to present a case which would justify a recovery under the second alternative".

1. This Court affirmed the district court's finding of fraud.

2. In its second amended complaint the Government alleged in detail the amount paid for each of the fraudulently obtained vehicles (R. 58-61, 64-65, 68-71). The Government proved the amount of these purchases by the introduction into evidence of the ac-

tual sales slips (R. 149-166). The district court specifically found that the vehicles had been purchased as described in the second amended complaint (R. 101-110, 112-113).

If, as appellees now contend, this Court intends to hold no more than that "the Government has failed to present a case which would justify recovery under the second alternative", the Government is at least entitled to know why this is so. Rather, as the Court well knows, the basis of the decision is the Court's holding that the choice of remedy is the Court's rather than the Government's. This is the issue to which our petition for rehearing was directed. No attempt has been made by the appellees to defend this basis of the decision. Instead they now attempt to justify the Court's opinion on a basis which is entirely without foundation and on which the Court did not rest.

Respectfully submitted.

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